

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20541

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In the Matter of)
)
Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)
)
Reexamination of the Policy Statement)
on Comparative Broadcast Hearings)
)
Proposals to Reform the Commission's)
Comparative Hearing Process to Expedite)
the Resolution of Cases)
)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

REPLY

Snyder Hill Broadcasting, Inc. ("Snyder Hill"), by its counsel, herewith submits its
Reply to the OPPOSITION TO REQUEST FOR CLARIFICATION AND/OR
RECONSIDERATION ("Opposition") in the above-captioned proceeding. In support
whereof, the following is stated:

1. William M. Smith ("Smith") in his Opposition seeks dismissal of the Request
for Clarification and/or Reconsideration as repetitive. By way of a footnote (F.N. 1)
Smith also contends that Snyder Hill is not an applicant, citing the Commission's *Public
Notice*, "Closed Broadcast Auctions Scheduled for September 28, 1999," ("Auction
Notice") Report No. AUC-99-25-A, DA 99-940, released May 17, 1999. That document
lists Kevin O'Kane and Linear Research Associates as separate applicants, ignoring the
fact that O'Kane has amended his application to substitute Snyder Hill as the applicant and
further ignoring the fact that Linear has dismissed its application. This matter has been

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more fully addressed in Comments filed in response to the Auction Notice by Snyder Hill on June 1, 1999. Those Comments are incorporated herein by reference. To briefly recap what is stated therein, Snyder Hill points out that the amendment to the O’Kane application was an amendment “as-of-right.” Further, Linear dismissed its application without said dismissal being contingent on approval of the Joint Request for Settlement or grant of the Snyder Hill application.

2. In light of the above, there appears to be no basis for the Commission considering O’Kane or Linear as applicants for purposes of the auction. In any event, Snyder Hill has requested clarification of that matter in its Comments filed in response to the Auction Notice. Presumably the Commission will clarify this matter prior to the auction. However, Smith’s disagreement with Snyder Hill’s position on the question of who the applicants are in this proceeding only serves to highlight the fact that the Commission’s rulings to date have not provided adequate clarity concerning the auction procedures as they impact on the Ithaca television proceeding. Snyder Hill does not agree with Smith’s characterization of the REQUEST FOR CLARIFICATION AND/OR RECONSIDERATION as “repetitive,” and Snyder Hill is entitled to clarification of the Commission’s procedures as long as there remains confusion as to how the procedures apply to the Ithaca proceeding.¹

3. Snyder Hill filed the instant pleading for one very simple reason. In denying Snyder Hill’s petition for reconsideration, the Commission stated (para. 16) that “the public interest would be best served by not delaying the commencement of the auction to

¹ The First Amendment to the United States Constitution guarantees the right to petition the government for redress of grievances.

litigate potentially irrelevant issues, and that deferring these issues conserves the resources of the private litigants as well as of the Commission, thereby expediting service to the public.” Snyder Hill recognizes that this rationale applies to disqualifying issues requiring litigation. Snyder Hill did not seek reconsideration of this aspect of the Commission’s ruling and agrees that to do so would have been repetitive.² However, the Commission’s articulated reason for denying reconsideration does not apply to issues that can be decided on paper without the need for litigation. Since the Commission’s rationale for denying reconsideration does not cover this aspect of Snyder Hill’s request, Snyder Hill is not being repetitive in its request for clarification.³

4. Finally, Smith argues, at para. 5, that the Commission has already rejected Snyder Hill’s arguments in a decision released the same day Snyder Hill filed its pleading - - *Rio Grande Broadcasting*, FCC 99-111, released May 25, 1999. Smith’s argument here contains two obvious flaws. First, *Rio Grande* was decided before the instant petition was filed. Therefore, it can have no impact on a request for clarification and/or reconsideration of the order on which it was based. The Commission had not had an opportunity to consider the arguments made in this phase of the proceeding when it decided *Rio Grande*. More importantly, Smith has misstated Snyder Hill’s argument in this proceeding. The distinction which is discussed in *Rio Grande* is not the distinction which Snyder Hill seeks to make in its petition herein. In *Rio Grande* the Commission

² This does not mean that Snyder Hill agrees with the Commission’s ruling, only that Snyder Hill recognizes that there is a logical nexus between the Commission’s ruling and its application to issues which require litigation.

³ Smith’s statement that “Snyder Hill is attempting to litigate a particular proceeding in the guise of a general rule making” misses the mark as well. If Snyder Hill waited to litigate its concerns in connection with the Ithaca proceeding, Smith would no doubt argue that Snyder Hill would be precluded from objecting to the new rules since it did not raise its objections in the rule making proceeding.

rejected the idea of distinguishing between issues that could result in denial of an application versus issues that could result in dismissal. Snyder Hill requests the Commission to make a distinction between issues that can be decided on paper and those that require a litigated hearing.

5. The allegation made in the Ithaca case is that Smith does not place a City Grade contour over any part of the city of license – Ithaca, NY. This is a matter which the Commission can decide without recourse to a hearing. All the Commission must do is review the engineering to determine whether City Grade coverage is provided as required by the rules. The parties to this proceeding have already spent countless hours discussing a matter that the Commission could have resolved in only a few hours, at most. While it is true that the Smith application should have been dismissed (and should be dismissed) for failure to place the required City Grade signal over Ithaca, it is not because the application should be dismissed that different treatment is required. Different treatment is required because this is a matter that can be resolved without litigation. The engineering facts are cut and dried. Either City Grade coverage is provided or it is not.

6. The reason that this distinction is necessary should now be obvious. To reiterate the obvious, the Commission's stated reason for waiting until after the auction to decide disqualifying issues is that "the public interest would be best served by not delaying the commencement of the auction to litigate" Litigation is not required in this instance. Indeed, all that is required is a simple engineering check of the application. Furthermore, a failure to run this simple check now flies in the face of the Commission's stated rationale for its policy, which is to conserve "the resources of the private litigants as well as the Commission, thereby expediting service to the public." (Para. 3, *supra*).

While this issue can be resolved without litigation prior to the auction, there is a virtual certainty that substantial, costly, and time-consuming litigation will be required after the auction should Smith be the successful bidder. This will also result in substantial delay of service to the public. Accordingly, the Commission's very rationale for delaying litigation until after the auction requires that issues such as this, which can be resolved without litigation, be resolved prior to the auction in order to avoid unnecessary post-auction litigation.

7. In conclusion, Smith's Opposition is obviously flawed. First, Smith is wrong in claiming that the pleading is repetitive. Second, Smith misstates the distinction that Snyder Hill proposes must be made by the Commission. The distinction is not whether the issue raised requires dismissal versus denial. The distinction is whether the issue raised can be resolved without litigation versus an issue that can only be resolved in a litigated hearing. However, the most puzzling aspect of the Smith Opposition is the very fact that Smith opposes the request at all. If Smith truly believed that his application was not defective, he would welcome the Commission making a ruling that the application met Commission requirements. This would end any potential for litigation on this issue once and for all.⁴ Clearly, there can be no basis for Smith opposing the instant request unless Smith knows that his application is defective. Since he knows that his application is defective, he can only proceed to an auction if he is willing to file a false certification that he is technically qualified. If the Commission were to do nothing at this point, it would run

⁴ Litigation would involve costs in legal fees and a forfeiture penalty under the Commission's auction procedures. Accordingly, there is a substantial incentive for Smith to obtain a ruling prior to the auction. There is no incentive for delaying a ruling in this case unless Smith knows that his application is defective.

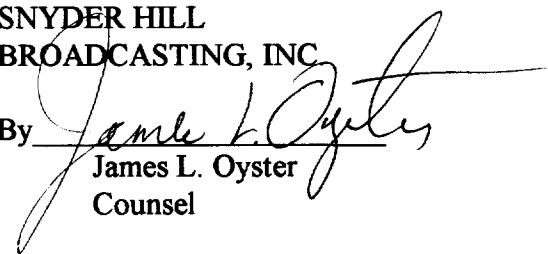
the risk of actually encouraging Smith to file a false certification. Certainly, the Commission does not want to be a party to such activity and should take steps as appropriate to assure that this matter is resolved prior to the auction.⁵

Respectfully submitted,

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June 7, 1999

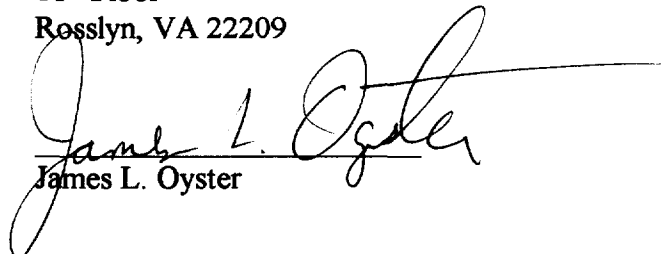
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BROADCASTING, INC

By 
James L. Oyster
Counsel

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing pleading by first class U.S. mail, postage prepaid, on or before the 7th day of June, 1999, to the following:

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⁵ Even if the Commission believes that this type of situation is unlikely to arise in the future, it could certainly instruct the staff to review the Smith application and make a determination in this specific case since it appears that every party would benefit from an advanced ruling here (unless Smith intends to prosecute a defective application with a false certification).